

Guantanamo Detention Facility – Why is it Still There?

by

Captain Steven P. Gardiner
United States Navy Reserve



United States Army War College
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by

Captain Steven P. Gardiner
United States Naval Reserve

Dr. Adam Silverman
Project Adviser

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U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

ABSTRACT

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On 22 Jan 2009, President Obama signed Executive Order 13492, *The Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*. This order specifically targeted the closure and disestablishment of Joint Task Force Guantanamo, and directed the release of, or the relocation of the detained enemy combatants presently being held there to some other form of holding/detention facility, either domestically or abroad. Nevertheless, almost four years later, the facility is still in operation, with no prospect of closure in the immediate future. The purpose of this paper is to identify some the legal, political and logistical impediments that have emerged since the initial establishment of the facility, and their impact upon the administration's efforts to rid itself of this legacy headache. In discussing these issues, I will also address some of the consequences that have arisen from the initial detention policy over the last ten years – those of divisive politics, fiscal concerns, domestic and international condemnation of the U.S., and the lost war of strategic communications.

GUANTANAMO DETENTION FACILITY – WHY IS IT STILL THERE?

The detained enemy combatants presently being held by the Joint Task Force have not been removed from Guantanamo Bay Naval Station and have not been placed in some other form of holding/detention facility, domestically or abroad, as directed by Executive Order 13492 (Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, signed 22 Jan 2009). The issue facing the current Administration is whether the impediments that have surfaced over the past ten years prove the impossibility of disestablishing the Joint Task Force, or has that Administration simply demonstrated a lack of political will.

While assigned as the Joint Task Force Guantanamo Inspector General in 2008, I once asked the JTF Commander just what it would take to close the Detainee Detention Facilities here at the Naval Station. The response was, “Not much, just a plane with 252 seats and a destination.” While this was obviously a somewhat simplistic and perhaps humorous response, the truth of the matter is that despite the best intentions of the present Administration to close this detention facility, it is now apparent that closing down the camps and disestablishing the Joint Task Force will require far more than simply relocating the presently detained enemy combatants somewhere else. Despite the signing of Executive Orders directing the disestablishment no later than 2010, the present Administration has been continually stalemated by issues of legality, political infighting, logistics, perceptions of security and a lack of international support – the impracticality of simplistic solutions to very complex problems.

The Objective of the Detention

The objective of the detention of the enemy combatants held by Joint Task Force Guantanamo is primarily to maintain the current Administration's policy of safe, humane, legal and transparent care and custody of detained enemy combatants. In its present location it provides adequate protection to both U.S. and allied populations by holding these individuals in a secure facility away from the U.S. mainland and the present theaters of operation. Additionally, the detention facility continues to conduct intelligence collection, analysis, and dissemination in support of ongoing overseas contingency operations. The detainees currently being held by Joint Task Force Guantanamo will remain in that protective custody until a final disposition of these individuals is determined by higher authority.¹

History

On 22 Jan 2009, then newly-elected President Barack H. Obama signed Executive Order 13492, (The Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities), beginning to make good on a campaign promise to the American people to disestablish the detention facility at Guantanamo Bay Naval Station, no later than one year from the signing.² At that same signing, he also issued Executive Order 13493, (The Review of Detention Policy Options), requiring for the establishment of a Special Interagency Task Force, (Special Task Force on Detainee Disposition). Its mandate was to assess the identification of potential legal, logistical and security issues regarding the transport of some of the detainees to the United States;³ this Executive Order also had the same suspense date of 2010. Now, almost four years later, there remain slightly less than 180 detained enemy combatants that continue to be held in Cuba, and the issue that

remains is why the detained enemy combatants still being held by JTF GUANTANAMO have not been removed from Guantanamo Bay Naval Station and placed in some other form of holding/detention facility, either domestically or abroad.

On 18 September 2011, in the wake of the 11 September terrorist attacks, the 107th Congress, by Joint Resolution, passed the Authorization for Use of Military Force (AUMF, Public Law 107-40, 115 Stat. 224), thereby authorizing the President of the United States to use

all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁴

Since the commencement of various military and civil actions executed during the War on Terrorism, over eight hundred individuals of more than forty different nationalities have been detained by US and NATO personnel.⁵ These individuals include terrorists, terrorist trainers, terrorist financiers, terrorist recruiters and facilitators, bomb makers, and even Osama Bin Laden's bodyguards.⁶ In 2002 the Bush Administration established the detention facilities at Naval Station Guantanamo, at Guantanamo Bay, Cuba as a secure place to confine these suspected enemy combatants. The circumstances behind locating this detention center off of U.S. soil, as well as that of the Joint Task Force that was stood up to support it were for reasons of legality and policy. This was specifically to avoid the possibility of suspected enemy combatants from challenging the legality of their detention or other wartime activities. The fact that the holding facility was physically established in Cuba was to provide a secure location from the theaters of operation, while at the same time providing the

appropriate availability for potential interrogation and possible future military war crime tribunals.⁷ Critics of this policy naturally saw it as a “law free zone”⁸ - a means to keep these suspected enemy combatants beyond the reach of US laws, while at the same time restricting the ability of those being held to challenge their detention.⁹

The supporting element, Joint Task Force GUANTANAMO (JTF GTMO), was charged with “...the safe, humane, legal and transparent care and custody of detainees, including those convicted by military commission.”¹⁰ The JTF was also tasked with conducting intelligence collection, analysis and dissemination for the safety and security of detainees and JTF Guantanamo personnel working in facilities, as well as in support of ongoing overseas contingency operations. JTF GTMO was also directed to provide support to law enforcement, to war crimes investigations, and to the Office of Military Commissions.¹¹

Detention Facilities and Infrastructure

The first detainees to arrive in Cuba, in 2002, were held in a temporary facility known as Camp X-RAY, a hold-over from the mid-1990's Haitian Migrant Operations (Camp Bulkeley), until the more permanent facilities could be brought to the Naval Station by barge in a modular configuration, for further assembly at the extreme southeast corner of the Station.¹² It was this open-wire appearance of the temporary housing of Camp X-RAY that gave the world the perception of the detainees, dressed in orange jumpsuits, kneeling on the ground, being held in “dog kennels” - a perception that to this day is still seen by some individuals as the type of detainee facilities currently in use, and of the “inhumane” treatment of the detainees.¹³ Although senior officials might not have been aware of it at the time, this perception would be the first in

a seemingly never ending series of international strategic communication defeats that the U.S. would suffer during the long War on Terrorism.

The suspected enemy combatants were held in Camp X-RAY for approximately four months, and then moved in April of 2002 to the Camp DELTA facility upon its completion¹⁴. Camp DELTA was the overall detention complex, comprising a total of almost a thousand beds, to include Camps 1 through 6, and all of it within a security perimeter. Camp IGUANA was located nearby, and according to the JTF history, "...is a much smaller, low-security compound, located about a kilometer from the main compound. In 2002 and 2003, it housed three detainees who were under 16 and was closed when those individuals were flown home in January 2004."¹⁵

Camp IGUANA was reopened in 2005 for the housing of the thirty-eight Uighurs, thereby bringing another issue in definitions and categorization to an already complex issue. These Muslim detainees are a Turkic ethnic group considered by the Chinese to be a separatist terrorist element. While receiving military training in the Tora Bora Mountains by Eastern Turkistan Muslim Group, the camp came under attack by U.S. aircraft, and the Uighurs fled to Pakistan. They were captured and handed over to U.S. forces and then delivered to Guantanamo, where the Bush administration alleged a connection with the Taliban or Al Qaeda. When challenged, the government could not prove sufficient evidence to the accusation.¹⁶ As their main operational focus was allegedly against the Chinese government, the Uighurs did not pose a direct U. S. threat. Nevertheless, as they were to be still considered a "terrorist threat", particularly to the Chinese, They could not simply be released, even once the Combatant Status Review Tribunals (CSRT) no longer deemed them "enemy combatants" in 2005.¹⁷

Basing this policy upon Article 3 of the U.N. Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, the Bush and Obama Administrations have directed that,

When the transfer of a Guantanamo detainee is deemed appropriate, the United States seeks diplomatic assurances that the person will be treated humanely by the foreign government accepting the transfer. If such assurances are not deemed sufficiently reliable, the transfer will not be executed until the concerns of U.S. officials are satisfactorily resolved.¹⁸

Unfortunately, for this reason they could not be repatriated to China - as a protection from torture or death by their home state – and they were retained at Camp IGUANA until another country could be found that would accept custody of them.¹⁹ This was another strategic communications defeat, as the world watched these “stateless” individuals languish on the island until released to other countries in 2009.

According to the JTF website and despite the maximum security status of the detainees, the camp *living conditions* for the suspected enemy combatants detained in the Camp DELTA facility meet or exceed the standards that one might find at lesser medium security facilities found in the United States. While this has all the appearance of “damage control”, it might well be the repercussions of the aggressive negative press the detention center has suffered in both domestic and international quarters, this perhaps intended to disprove the perception of mistreatment and “inhumane” living conditions. As a result, the command has shifted to the other end of the spectrum, and become far more accommodating to the detainees than it did in the first few years of its existence.

Detainees are provided with the standard three meals per day, accommodating cultural and/or *halal* desires as necessary, as well as any dietary or health requirements, and may indulge in as many as 4500 calories per day. They are also

provided with various necessities, such as bedding, clothing, and personal hygiene requisites. Additionally, detainees enjoy such comfort items as the ability to send and receive mail. They also may partake of movies, books, magazines, and newspapers from an 18,000 item library, "...from picture books to doctorate-level materials, printed in more than 18 different languages."²⁰

Detainees also are allowed up to eighteen hours of communal recreation. They are given five dedicated times of uninterrupted worship for up to twenty minutes each period and the JTF provides prayer beads, rugs, and an arrow painted on the floor of each cell pointing towards Mecca, and personal copies of the Quran in up to forty languages and dialects, specifically handled only by Muslim personnel in order to facilitate and accommodate religious requirements.²¹ Muslim holy days are also recognized by the JTF, and detainee schedules accommodate these. Detainees have access to legal counsel and members of various non-governmental or international organizations such as the International Committee of the Red Cross on a regular basis. They enjoy exceptional first-rate medical care, including access to specialists in cardiology, orthopedics, and prosthetics; the ratio of medical staff to detainee in 2008-2009 was approximately one doctor or nurse to every 2.5 detainees.²²

The first three camps, Camps 1 to 3, are not presently used but are available for overflow or emergent need. Camp 4, when used, housed the most compliant detainees in communal-living styled ten man sleeping bays, unlike the single man rooms of the Camps currently in use. These individuals were allowed twenty hours of communal recreation time, access to sports equipment, and were allowed to participate in language and literacy classes and could watch movies on large screen television.²³

Camps 5 and 6 are currently occupied, and physically comprise a modern maximum security facility that is modeled after those facilities now in use at U.S. state penitentiaries. They are climate controlled, modular, and have an aggregate cost of over \$50 million.²⁴ Single-occupant cells make up the two floors of each facility, each with personal sinks and toilets. Outdoor recreation facilities and medical units have been incorporated in the design. Camp 5 is handicap accessible for detainees with physical disabilities.²⁵

Legality of Detention

Detainees presently being held by Joint Task Force Guantanamo are, according to its website, individuals found to be fighting as unlawful enemy combatants. International law defines a lawful combatant as one who wears a uniform, carries his weapons openly, responds to the hierarchy of military authority and fights according to the laws of war (e.g., not targeting innocent civilians).²⁶ The detainees held at Guantanamo were captured while allegedly fighting for, or providing support to, al-Qaeda or the Taliban – neither of which abide by the laws of war. They fight in the ruthless manner of an insurgency, targeting both military and civilians alike. This approach to war has been long established by culture, tradition, and regional bias, and is anathema to the manner established in the Conventions. According to the *Geneva Conventions*, Article 3, 1949, the term “enemy combatant” traditionally was used to describe the opposing individuals or members of the armed forces of a warring state; they could also be considered to be a “Party to the Conflict”.²⁷ However, in the post 9/11 context, the term was applied specifically to individuals considered to be linked to terrorist elements, such as Al Qaeda or the Taliban, by the Bush Administration. As these persons are technically not considered Prisoners of War under the definition as

stipulated by the Geneva Conventions, they have been therefore rightly considered “Unlawful Combatants”.²⁸

The Congressional Research Service Report, “*Closing the Guantanamo Detention Center: Legal Issues*”, further defined those detainees held on the island, and legally categorized as:

- Non-penal enemy combatants, or those now as a prevention towards recidivism (that of returning to the battlefield or hostilities/ reengaging in anti-coalition or other terrorist activities)
- Detainees who are pending or are likely to face criminal charges
- Detainees who have been cleared for transfer or release to a foreign country but remain in U.S. custody due to concerns about their possible mistreatment upon transfer.²⁹

Fiscal Concerns Regarding the JTF

Because of its austere location, its difficult access, and the fact that logistically all sustainment and development material must arrive by air or sea, the Naval Base at Guantanamo Bay has always been a difficult base to support. As a tenant of that base, the Detention Facility at Guantanamo is an extension of that supply chain, and because of the logistic problems indicated, as well as the large detention staff mandated, it may be considered the most expensive holding prison on the planet. The annual cost is more than \$150 million, or approximately \$800,000 per detainee, compared to other federal prisons whose operating costs run on the yearly average of \$25,000 per prisoner.³⁰ Many that saw the initial need for the establishment of the facility in its present location at the start of the War on Terror now argue that a cost benefit analysis is needed to assess present and future budgetary commitments.³¹ The Detention Facility, going on

its tenth year of operation, is suffering both structurally and technologically. The facility, materially, is a victim of the harsh moisture-laden environment and support elements have long suffered, while the computer and cyber capacity and capability are long due for an overhaul. New elements in the way of medical facilities, administrative spaces, information storage and other capital improvements have already been fiscally laid out for another decade of use.³²

Legal Concerns

On 28 June, 2004, the U.S. Supreme Court ruled that suspected enemy combatants detained at JTF GTMO could actually seek judicial review of the circumstances surrounding their detention.³³ Congress countered this finding with the Detainee Treatment Act of 2005 (DTA, P.L. 109-148, Title X), and the Military Commissions Act of 2006 (MCA, P.L. 109-366).³⁴ However, in 2008, in *Boumediene v. Bush*, the Supreme Court ruled that the constitutional writ of habeas corpus extends to the non-US citizens held at Guantanamo, thereby offering the detainees the opportunity to seek a review regarding the legality of their detention.³⁵ Legal questions arising from this finding include the scope of habeas review, the legal remedy available to unlawfully held individuals by and in the United States, and exactly what other constitutional provisions extend to suspected enemy combatants.³⁶

President Obama issued Executive Order 13492, (Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities) on 22 Jan 2009, thereby directing the disestablishment of the Guantanamo detention facility, effective no later than a year from the date of the Order. This Order also effectively directed the Secretary of Defense to halt all proceedings before military commissions and the United States Court of Military Commissions Review.³⁷

Additionally, it also directed the JTF to conduct a review of all detained enemy combatants presently held at Guantanamo Bay Naval Station, and to "...assess whether the detainee should continue to be held by the United States, transferred or released to a third country, or be prosecuted by the United States for criminal activity."³⁸ The President also issued Executive Order 13493, (Review of Detention Policy Options) on that same day; in it was the requirement to establish a Special Interagency Task Force, (Special Task Force on Detainee Disposition), to assess the identification of legal, logistical and security issues of the transport of some of the detainees to the United States.³⁹

In March of 2009, the Obama Administration's Justice Department filed court papers to stop referring to Guantanamo inmates as "enemy combatants"; a term that has been used liberally to describe detained individuals collected upon the battlefield and resultant intelligence operations over the past ten years. This term has now been dropped from the lexicon by the Obama Administration. Attorney General Eric Holder stated, "As we work towards developing a new policy to govern detainees, it is essential that we operate in a manner that strengthens our national security, is consistent with our values, and is governed by law."⁴⁰

This was seen by the public as a shift to a "return to the Geneva Convention," and the new administration's desire to establish a

legal structure for holding the Guantanamo prisoners that will now be based on laws passed by Congress and, by extension, international law, including the Geneva conventions...in addition, only those who provided "substantial" support to al Qaeda, the Taliban or similar groups -- or who were "part" of those groups -- would be considered candidates for detention. It said those at Guantanamo will no longer be held on the exclusive basis of the president's authority as commander in chief. Bush, who sought to expand presidential powers during his eight years in office,

had asserted his war powers were enough legal reason for holding prisoners. Bush officials also said they were not legally subject to the Geneva Conventions on prisoner treatment -- a view the Supreme Court rejected.⁴¹

Six months later, one detainee, Ahmed Ghailani, was tried in federal civilian court, and sentenced to life imprisonment. Despite a precedent having been established, the concept of federal court trials proved to be extremely controversial and the object of considerable popular dislike.⁴² As Ghailani was convicted on only one of the 280 charges, CRS report observed that while some see this as,

...demonstrating that federal civilian courts serve as an appropriate forum for the prosecution of some Guantanamo detainees, others view Ghailani's acquittal of most charges as evidence that civilian courts are an inappropriate forum for the criminal prosecution of wartime detainees.⁴³

Countering that argument, Sarah Mendelson, director of the Center for Strategic and International Studies' human rights and security initiative, and supported by the successful convictions in the cases involving Jose Padilla Carlos Bledsoe, Richard Reid, and Umar Farouq Abdulmutallab via civilian system, stated that "the U.S. criminal justice system has proven an effective venue for prosecuting terror suspects, especially when compared with the military commissions." The report supports this statement with a recounting that "107 jihadist terror cases – some with multiple defendants – have been tried in civilian courts since 2001 with 145 convictions."⁴⁴

Former editorial writer on legal issues for the Washington Post and author of the book, *Law and the Long War*, Benjamin Wittes stated several significant issues detailing the impracticality of prosecuting enemy combatants through the civil court venue - specifically evidentiary concerns.

Evidence against some may be tainted by coercion or torture, unavailable because classified as secret or inadmissible because of mundane courtroom issues such as proving chain of custody or the like. In many

cases the quantity of the evidence may be simply insufficient to meet the beyond-a-reasonable-doubt standard applicable in criminal trials.⁴⁵

JTF GTMO completed its detainee review in January 2010, concluding that approximately thirty six detainees are part of, or the focus of, “active criminal investigations or prosecutions”⁴⁶. Additionally, the review found that forty-eight detainees “should remain in preventative detention, without trial”⁴⁷, as they are considered “too dangerous to transfer, but not feasible for prosecution.”⁴⁸ The review also concluded that all remaining detainees “...may be transferred, either immediately, or eventually to a foreign country.”⁴⁹

Domestic Detention Concerns

On 15 Dec 2009, President Obama issued a Presidential Memorandum to the Attorney General and the Secretary of Defense, directing Illinois’ Thomson Correctional Center to be prepared to receive some of the detainees presently held at Guantanamo Bay Naval Station, thereby providing the needed start to the execution of the previously established Executive Order 13492.⁵⁰ The \$140 million Illinois facility was completed as a minimum/maximum security complex in 2001; the maximum security element comprised eight pre-cast concrete cell houses of 1,600 cells, with the minimum security component offering an additional 200 beds. The 146 acre site was surrounded by a twelve-foot outer fence and a fifteen-foot dual-sided, electric interior fence.⁵¹ Due to fiscal constraints suffered by the Illinois State Department of Correction, as well as labor union opposition to closing other state prisons in the state, the maximum security element of the facility was never occupied, and the minimum security element that was in use was closed in 2010.⁵²

The Obama Administration's initial desire was to transfer approximately one hundred of the detainees to the facility. It was not able to do so because it could not obtain the appropriations to purchase the prison and renovate it to "supermax" standards.⁵³ Opponents to moving the detainees to U.S. soil see this first step as a constitutional slippery slope; once here, things could change dramatically for the detainees. David Remes, legal director for the group Appeal for Justice and litigator for a number of detainees, has stated "When the habeas lawyers heard that Obama wanted to close Guantánamo, we thought that was a good thing because it would mean the men would be sent home. We never imagined that to close Guantanamo would mean 'move to a new location'".⁵⁴ While there is speculation that constitutional rights for detainees might expand (*Hamdi v. Rumsfeld*),⁵⁵ there is also a general fear that the living conditions may actually get worse for the detainees should the transfer occur. Remes says that he expresses a concern as to detainees "now living in 'relatively humane conditions of confinement' at Guantanamo may find themselves transferred into bleak supermax prison conditions."⁵⁶ Additionally, the closing of the detention facility in Guantanamo, and the establishment of a "GTMO North" could be perceived as more than a victory for just human rights activists; while making discussions in that context, a senior Administration official stated that "Closing the detention center at Guantanamo is essential to protecting our national security and helping our troops by removing a deadly recruiting tool from the hands of Al Qaeda."⁵⁷ Nevertheless, as of June 2010, these plans remain unfulfilled as Congress continues to refuse funding and has not amended the legal prohibition regarding the allowance of uncharged detainees to be brought to the United States.⁵⁸

Congressional Restrictions

In FY2011, Congressional legislation was established barring military funds for the construction or modification of a facility in the United States to house and maintain detainees presently under the custody and control of the Department of Defense.⁵⁹ The Congressional Research Service has reported that the Obama Administration has been hampered by Congressional enactments that have limited executive discretion as to the transfer or release of detainees into the United States. In January 2011, the establishment of the Ike Skelton National Defense Authorization Act for FY2011 (2011 NDAA, P.L. 111-383) denied funds for the assistance or transfer of, or eventual release of detainees into the United States reopened the military tribunal process.⁶⁰ As a result, the President issued Executive Order 13567 in March 2011, officially restoring the tribunal process, while establishing a formal periodic review of those cases pertaining to non-penal detainees being held indefinitely without trial.⁶¹ These were not designed as a plimsoll mark for the legality of the individuals' detention, but simply as a *review* to indicate whether the holding of the detainee is actually based on a point of national security. Because of this, the appropriate suspected enemy combatant detainee has two venues for trial: Military Commissions and US Federal Court. The Military Commissions Act of 2006 was established originally to limit the ability to challenge detention via habeas petitions, as well as keeping the death penalty option available.⁶² The Military Commissions Act of 2009 had amended the 2006 Act, limiting the use of hearsay, coerced evidence, and providing for greater due process.⁶³ The Federal Court venue would try detainees under Article III of the U.S. Constitution. To date, of those detained enemy combatants presently held at Guantanamo, only Ghailani's case has been disposed of this way.

The Congressional Research Service Report, *“Closing the Guantanamo Detention Center: Legal Issues”*, also identified critical detainee legal issues should the facility close, particularly if those detainees are transferred to the United States, as opposed to a third country. The first issue concerns the nature and scope of the constitutional protections owed to detainees within the United States. These may be different from the protections owed to aliens held abroad. The transfer of detainees to the United States may also have immigration consequences, as well as issues regarding political asylum. The report was prepared for Members and Communities of Congress to

...provide an overview of major legal issues likely to arise as a result of executive and legislative action to close the Guantanamo detention facility.” It discusses legal issues related to the transfer of Guantanamo detainees (either to a foreign country or into the United States), the continued detention of such persons in the United States, and the possible removal of persons brought into the country. It also discusses selected constitutional issues that may arise in the criminal prosecution of detainees, emphasizing the procedural and substantive protections that are utilized in different adjudicatory forums (i.e., federal civilian courts, court-martial proceedings, and military commissions).⁶⁴

Presently, there are essentially three courses of action available to the Administration - two of which meet the criteria established in Executive Order 13492 signed in January of 2009, specifically the disestablishment of the Guantanamo Bay detainee facility, while a third option maintains the facility in its present location. The first option deals with maintaining the status quo and leaving the established facility in Cuba. Despite three Executive Orders and one Executive Memorandum, the Obama Administration is no closer to shutting the doors on the detainee facility than it was almost three years ago, mainly due to Congressional restrictions, threats of recidivism, the legal status of the 171 detainees remaining at the Naval Station, and popular

opinion. All of these issues have combined significantly to halt almost all forward progress on the disestablishment of the JTF and have since forced the Obama Administration to reevaluate their mandate to close the Guantanamo facility. Congressional action has prohibited the transfer of detainees to U.S. soil; this prohibition is founded upon the U.S. population's fear of bringing "accused terrorists" to the middle of the American heartland, a risk thought to be "...*effectively putting a bull's eye there for other terrorists*".⁶⁵ Because of this concern, some have expressed skepticism for the plan, claiming the move could make Illinois a target for terrorism and citing that plans to move detainees to Illinois will not make Americans any safer.⁶⁶ Republican Congressman Eric Cantor stated that, "Most families neither want nor need hundreds of terrorists seeking to kill Americans in their communities."⁶⁷ Supporters of domestic detention counter that argument by citing the fact that approximately 172 individuals have been indicted or convicted for Islamist terrorist plots or actions since 11 September 2001 and are presently being held in U.S. penal facilities.⁶⁸

Moreover, U.S. law forbids the transfer of uncharged persons to U.S. soil, and various human rights groups are concerned that a new precedent of having unindicted individuals in US prisons will be established. The solitary confinement of uncharged detainees at a "supermax" facility violates the treatment of prisoners of war, according to Article 38 of the Geneva Convention.⁶⁹ The risk assessment of the high rate of recidivism has also influenced the Administration's relook at the closure. Defense Department estimates show that there has been a more than twenty percent rise in recidivism - those either known to have, or suspected of returning to the terrorist fight -

up from fourteen percent in June of 2010, and these figures includes not only returns to the battlefield, but the perception of recruiting as well.⁷⁰

Administration officials feel that the “comprehensive review process” now in effect will mitigate and monitor those released back into the population. This process, however, has been in effect since 2010 and the numbers have continued to rise, leaving legislators and policymakers with cause for concern.⁷¹ Maintaining the status quo for detained enemy combatants provides secure detention at the Joint Task Force Guantanamo facility located at Guantanamo Bay Naval Station, provides safe and humane care for the detainees, safeguards the general U.S. population, meets U.S. law requirements for unindicted detainees, and does not incur additional transportation expense to the taxpayer. Additionally, its present location in no way hinders access by concerned parties, such as the International Committee of the Red Cross (ICRC), detainee legal defense, or human rights groups.⁷²

The second option involves the removal of the detainees to the United States. The administration could execute the previously established Executive Order 13492, directing the Thomson Correctional Center (TCC) to be prepared to receive the detainees presently held at Guantanamo Bay Naval Station that have been, or will be designated for relocation. This facility at present will need to be purchased and retrofitted to meet the requirements of a “supermax” penitentiary. Additionally, U.S. law will have to be amended to allow the aforementioned argument in the first option, regarding unindicted individuals being held in custody for extended periods of time, as well as to release funding from Congress for transporting detainees north.⁷³ Joint Department of Justice and Department of Defense procedures will be required, as laid

out in the Memorandum. Supporters for the move and administration officials see it as a local bolster to the region's economy and argue that the risk of holding terrorists on U.S. soil has no merit as there are more than 350 convicted terrorists presently serving in U.S. prisons. Opponents tend to view the move as simple cronyism to the Administration's home state roots.⁷⁴ Nevertheless, this option is feasible only if the requisite government branches reach some level of consensus, allowing the appropriate direction of funding and the required amendments to current U.S. law.

The final option would, in effect, provide for the transfer of detained enemy combatants presently held at the Joint Task Force Guantanamo facility to other countries. Since 2002, over 600 detainees have been repatriated or transferred to third countries, "...because there was scant evidence of their involvement with terrorist groups or they were deemed low-level foreign fighters."⁷⁵ The Obama Administration has likewise reviewed and cleared approximately forty detainees for release; thirty of these are Yemenis, but due to the amorphic nature of the Yemeni security environment, they have been put in an "administrative hold" until that country's government stabilizes.⁷⁶ In some cases, however, detainees have not been transferred to either home or third countries due to issues of international law; under Article 3 of the UN Convention against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, "...it is illegal to expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁷⁷ As a signatory of that document, the U.S. is compelled to find a follow-on community that can safeguard these individuals. The forty-eight detainees that the present Administration says will be held indefinitely under the laws of war, defined

as “preventative detention,” will need to be secured in a facility that will be in “a manner consistent with the law and the national security and foreign policy interests of the United States.”⁷⁸ So far, there have been no countries willing to take them or that the U.S. has the confidence in to do so. Andrew McCarthy, chairman of the Center for Law and Counterterrorism at the Foundation for the Defense of Democracies, and legal editor for the National Review, argued that if the emphasis is on simply reducing the population at Guantanamo, it is a poor focus. The former federal prosecutor stated,

Thus far, it’s shown itself to be a terrible idea. To the extent that we’re trying to shovel people into other countries, all that does is to empty out Gitmo, but it doesn’t make the problem any better. It makes the problem in many ways worse.⁷⁹

Of the three courses of action available to the Administration, the first option, that of maintaining the policy already in effect for detained enemy combatants, is probably the best course. It supports and is in line with present U.S. law, maintains the policy of holding these individuals in a secure facility, provides a preventative measure against recidivism, and supports the desire of the American people to keep these individuals from being incarcerated on U.S. soil while still allowing their legal counsel access.

Discussion and Conclusion

In October of 2011, John Brennan, Deputy National Security Advisor for the current administration, indicated that the U.S. will no longer be sending any new unlawful enemy combatants to Guantanamo Bay Naval Base for detention. Speaking for the President he indicated that “It’s the Administration’s policy to close Guantanamo, and despite some congressional hurdles that have put in our path, we’re going to continue to pursue that.”⁸⁰ Rep. Adam Smith, the senior Democrat on the House Armed

Services Committee, commenting on just how significant these hurdles were stated that “...it will be ‘very difficult’ for President Barack Obama to shut down the U.S. prison at Guantanamo Bay before the end of the president’s first term.... will be very difficult, obviously.... It is getting to be a problem and a challenge – we have all these Congressional blocks.” He went on to say that these perceived Congressional blocks are “a real impediment” to the Obama administration’s efforts to close the detention facility and vowed to “try to make sure that Congress does not tie the President’s hands.”⁸¹ Nevertheless, Attorney General Eric Holder continues to advance the idea that the detention facility will be closed before the elections in November 2012, stating that “Closing Gitmo is a goal and objective of the Administration and the President hasn’t changed his mind.”⁸²

Republican Senator Kelly Ayotte, member of the Senate Armed Services Committee, stated that

It’s troubling that the Attorney General would talk about terrorist detention policy in the context of a campaign timeline. Politics should have nothing to do with how we detain terrorists and protect Americans. I will continue to work with members of both parties to protect Americans by keeping Guantanamo open and preventing the use of any funds for the construction of facilities in the United States to hold Gitmo detainees.⁸³

Some have considered all of the above as nothing but political sparring. Human Rights First President Elisa Massimino stated that “Nobody thought closing the facility would be easy, but it never should have been a political fight,” at the same time urging that the Obama Administration “stand up to congressional and political opposition, using the veto threat on any legislation that threatens to keep the prison open.”⁸⁴

Nevertheless, Karen Greenberg, then executive director of the Center on Law and Security at New York University, and now director of Fordham University’s Center on

Law and Security, points out that “The United States needs a better system for assessing and addressing the dangerousness of people in custody. We still have in place essentially no plans for rehabilitation or deradicalization; we've put [those detainees in preventative detention] in a category that they can never get out of, with or without evidence.”⁸⁵

The issue of detained enemy combatants is truly a wicked problem. The detention facilities supported by JTF Guantanamo were never made to be a permanent solution to the terrorist detention problem and even initial supporters are raising questions, asking how all of this ends. Robert Chesney, visiting professor at The University of Texas Law School at Austin considered this a

...broader failure of policy on how to deal with suspected terrorists captured both within and outside the United States...for more than seven years, we've struggled to define a counterterrorism policy that is effective, that is politically sustainable and simultaneously reflects our core values as Americans. We have not yet succeeded in doing this.⁸⁶

From the facility's very conception, the individuals held there have not, and are not considered prisoners of war, but rather unlawful enemy combatants - had the Bush Administration taken more thought at just how these individuals were classified at the beginning of the War on Terrorism, some of the detainees' eventual dispositions would undoubtedly have been simpler. Likewise, they are not being incarcerated in a “penal” environment as a form of punishment or reform, but rather they are being held in a “custodial” manner, until a higher authority deems them harmless and releases them to the appropriate agent. Though most were picked up on the battlefield, some detainees contend that they were the products of cash bounties and political rivalry, leaving a mixed bag of true combatants, and the innocent. Some high value detainees are slated to be held indefinitely and will undoubtedly never see freedom again. However, by just

what legal process that imprisonment will be established, and where that preventative detention will be served - in Cuba, the United States, or a foreign country, no one has yet to say. Finally, both the Bush and Obama Administrations can claim a resounding defeat, both domestically and abroad, in the strategic communication battle as to how the U.S. has dealt with the detainee issue from the start. Former Assistant Secretary of Defense for Detainee Affairs Charles Stimson, and now senior legal fellow at the Heritage Institute observed that “the facility has taken ‘a moral toll’ on the U.S. image at home and abroad.”⁸⁷ The negative perceptions made regarding detainee operations have without question irreparably damaged our honor, integrity and goodwill in the international area, and the secondary and tertiary effects will impact U.S. foreign policy for generations to come.

Both of the Administrations have shown that the United States needs to rethink its detention policy, not in light of politics, but through the lens of national security. The simple reality is that detained enemy combatants need to be kept off of the battlefield. Where and how this is accomplished is the task of the current Administration and possibly the many administrations that will succeed it.

Endnotes

¹ *The Joint Task Force Guantanamo Home Page*, <http://www.jtfgtmo.southcom.mil/xWEBSITE/index.html> (accessed 16 December, 2011)

² Barack H. Obama, Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, (Washington, DC: The White House, January 2009)

³ Barack H. Obama, Executive Order 13493, *Review of Detention Policy Options*, (Washington, DC: The White House, January 2009)

⁴ Richard F. Grimmett, Congressional Research Service, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40); Legislative History* (Washington DC: US Government Printing Office, 16 January, 2007)

⁵ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): 1

⁶ *The Joint Task Force Guantanamo Home Page*,
<http://www.jtfgtmo.southcom.mil/xWEBSITE/index.html> (accessed 16 December, 2011)

⁷ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): 2

⁸ Jost, Kenneth, "Closing Guantanamo", CQ Researcher, February 27, 2009. Generally an overseas military facility remains the sovereign property of the host nation, depending on the appropriate Status of Forces Agreement (SOFA). However, the Naval Station at Guantanamo Bay is unique, as it is the only overseas base that does not have official diplomatic relations with the host nation, nor does the U.S. government recognize the sovereignty of the Castro government. The base' existence is founded on the established 1934 lease agreement, and can only be terminated by consent of both parties and U.S. abandonment of the Naval Facility.

⁹ Ibid.

¹⁰ *The Joint Task Force Guantanamo Home Page*,
<http://www.jtfgtmo.southcom.mil/xWEBSITE/index.html> (accessed 16 December, 2011)

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Jost, Kenneth, "Closing Guantanamo", CQ Researcher, February 27, 2009

¹⁷ Ibid.

¹⁸ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): 8

¹⁹ *Joint Task Force Guantanamo Home Page*,
<http://www.jtfgtmo.southcom.mil/xWEBSITE/index.html> (accessed 16 December, 2011)

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid

²⁴ Ibid.

²⁵ Ibid. There is an additional camp, used for the holding of High Value Detainees; both its location and access are classified.

²⁶ *Geneva Conventions*, Article 3, 1949

²⁷ Ibid.

²⁸ Ibid.

²⁹ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): summary sheet

³⁰ Carol Rosenberg, "Guantanamo: The Most Expensive Prison On Earth", *Miami Herald*, 08 November, 2011

³¹ Ibid.

³² Ibid.

³³ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): 2

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Barack H. Obama, Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, (Washington, DC: The White House, January 2009)

³⁸ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): 3

³⁹ Randall Mikkelsen, "Guantanamo Inmates No Longer "Enemy Combatants", *Reuters*, 14 March, 2009

⁴⁰ Ibid.

⁴¹ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): 4

⁴² Ibid., 4

⁴³ Ibid., 5

⁴⁴ Jost, Kenneth, "Closing Guantanamo", CQ Researcher, February 27, 2009

⁴⁵ Ibid.

⁴⁶ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): 5

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Barack H. Obama, Executive Order 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, (Washington, DC: The White House, January 2009)

⁵¹ MSNBC homepage http://www.msnbc.msn.com/id/34424834/ns/us_news-security/t/ill-town-welcomes-plan-house-detainees/

⁵² Amanda Paulson, December 15, 2009, "Illinois Divided Over News of Incoming Guantanamo Detainees", The Christian Science Monitor, 15 December, 2009

⁵³ Chase Riveland, "Supermax Prisons: Overview and General Considerations", US Department of Justice Report, January, 1999: 19-21

⁵⁴ Warren Richey, "Guantanamo Detainees On US Soil; A Legal Minefield", The Christian Science Monitor, 15 December, 2009

⁵⁵ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011), 13

⁵⁶ Warren Richey, "Guantanamo Detainees On US Soil; A Legal Minefield", The Christian Science Monitor, 15 December, 2009

⁵⁷ ABC News homepage <http://abcnews.go.com/Politics/obama-white-house-announces-transfer-guantanamo-detainees-illinois/story?id=9342554&page=2>

⁵⁸ Devin Dwyer, "Five Reasons Guantanamo Won't Close This Year" ABC News website <http://abcnews.go.com/Politics/Media/obama-plan-close-guantanamo-stuck-political-legal-limbo/story?id=10752684>, 02 June, 2010

⁵⁹ National Defense Authorization Act of 2011, Public Law 111-383, 111th Cong., 2nd sess., (22 December, 2010), 215 - 219

⁶⁰ Ibid.

⁶¹ Congressional Research Service, *Closing the Guantanamo Detention Center: Legal Issues* (Washington DC: US Government Printing Office, February 2011): 5

⁶² Ibid.

⁶³ Ibid., summary page

⁶⁴ Ibid.

⁶⁵ Devin Dwyer, "Five Reasons Guantanamo Won't Close This Year" ABC News website <http://abcnews.go.com/Politics/Media/obama-plan-close-guantanamo-stuck-political-legal-limbo/story?id=10752684>, 02 June, 2010

⁶⁶ Ibid.

⁶⁷ Jost, Kenneth, "Closing Guantanamo", CQ Researcher, February 27, 2009

⁶⁸ Bergen, Peter, Hoffman Bruce, Tiedemann, Katherine (2011) "Assessing the Jihadist Terrorist Threat to America and American Interests", *Studies in Conflict and Terrorism*, 34:2, 65-101

⁶⁹ *Geneva Conventions*, Article 3, 1949

⁷⁰ Devin Dwyer, "Five Reasons Guantanamo Won't Close This Year" ABC News website <http://abcnews.go.com/Politics/Media/obama-plan-close-guantanamo-stuck-political-legal-limbo/story?id=10752684>, 02 June, 2010. This recruiting activity takes various forms, though many have involved some type of monograph of personal detention in Cuba. Books such as David Hick's autobiography "*Guantanamo: My Journey*", docu-dramas such as "*The Road to Guantanamo*", depicting three British subjects later known as the Tipton Three, and even opinion pieces by resettled Uighurs in such internationally known newspapers as the *New York Times*, have all made their impact upon shaping public opinion about detainee operations. Even such well-respected and established entities as the *National Geographic* have given voice to released detainees' stories, as in their video "*Inside Guantanamo*", filmed while I was stationed at JTF GTMO. While these individuals may not be considered the traditional "return to the battlefield" concept of recidivism, their personal accounts of alleged abuse or torture can pose a subtle, though very legal re-engagement by anti-U.S. or anti-coalition factions upon the U.S. administration. Propaganda in the form of anti-U.S. statements, while inflammatory and possibly considered treasonous by some, are protected by the First Amendment, and are presently are not considered as an insurgent or terrorist activity. Through the media, the public speaking circuit, and even the judicial tort system, some released detainees have found a forum, both domestically and internationally, to plead their case of wrongful capture and detention. Some have even shaped U.S. policy; it was Shafiq Rasul, one of the Tipton Three, who was responsible for the Supreme Court decision that detainees held at Guantanamo had the constitutional right to challenge their detention (*Rasul v. Bush*).

⁷¹ Barack H. Obama, Executive Order 13493, *Review of Detention Policy Options*, (Washington, DC: The White House, January 2009)

⁷² *The Joint Task Force Guantanamo Home Page*, <http://www.jtfgtmo.southcom.mil/xWEBSITE/index.html> (accessed 16 December, 2011)

⁷³ Devin Dwyer, "Five Reasons Guantanamo Won't Close This Year" ABC News website <http://abcnews.go.com/Politics/Media/obama-plan-close-guantanamo-stuck-political-legal-limbo/story?id=10752684>, 02 June, 2010

⁷⁴ Ibid.

⁷⁵ Jonathan Masters, "Closing Guantanamo?", *Council on Foreign Relations*, November 9, 2011

⁷⁶ Ibid.

⁷⁷ *Geneva Conventions*, Article 3, 1949

⁷⁸ Jonathan Masters, "Closing Guantanamo?", *Council on Foreign Relations*, November 9, 2011

⁷⁹ Jost, Kenneth, "Closing Guantanamo", CQ Researcher, February 27, 2009

⁸⁰ Politico homepage <http://www.politico.com/news/stories/0911/63921.html#ixzz1casUalul>

⁸¹ Politico homepage <http://www.politico.com/news/stories/0911/64083.html#ixzz1cauhPkib>

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Politico homepage <http://www.politico.com/news/stories/0911/63921.html#ixzz1casUalul>

⁸⁵ Jonathan Masters, "Closing Guantanamo?", *Council on Foreign Relations*, November 9, 2011

⁸⁶ Jost, Kenneth, "Closing Guantanamo", CQ Researcher, February 27, 2009

⁸⁷ Ibid.